87 752

No.

Supreme Court, U.S.
FILED
NOV 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN T. LIGHTNER,
d/b/a LIGHTNER AUTO SALES,

Petitioner,

v.

BARRY JONES and BRUCE WHITE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN A. DIENNER, III
LYDON & GRIFFIN
A Professional Corporation
100 West Monroe Street
Eighteenth Floor
Chicago, Illinois 60603
(312) 346-9538

Attorney for Petitioner

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

49 pp

QUESTIONS PRESENTED FOR REVIEW

A.

Whether federal officials, who intentionally deprive an innocent citizen of his property, may successfully claim immunity from suit pursuant to *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) until the exact factual circumstances have appeared in a widely reported decision?

B.

Whether federal officials, who knowingly engage a scheme to defraud a specific innocent citizen of his property, lack criminal intent as a matter of law merely because of their employment status?

LIST OF PARTIES TO PROCEEDINGS BELOW

Anne Powers, plaintiff

John T. Lightner, d/b/a Lightner Auto Sales, defendant, third-party plaintiff

Barry Jones and Bruce White, third-party defendants

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF PARTIES TO PROCEEDINGS BELOW	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT:	
A.	
THIS CASE RAISES THE IMPORTANT QUESTION OF WHETHER GOVERNMENT OFFICIALS, WHO KNOWINGLY AND INTENTIONALLY DEPRIVE A CITIZEN OF HIS PROPERTY MAY SUCCESSFULLY CLAIM IMMUNITY FROM SUIT, PURSUANT TO *HARLOW v. FITZGERALD*, 457 U.S. 800 (1982), UNTIL THE EXACT FACTUAL PREDICATE HAS APPEARED IN A WIDELY REPORTED DECISION	8
B.	
THIS CASE RAISES THE IMPORTANT AND UNSETTLED QUESTION OF WHETHER GOVERNMENT OFFICIALS, WHO KNOWINGLY ENGAGE A SCHEME TO DEFRAUD A SPECIFIC CITIZEN OF HIS PROPERTY, LACK CRIMINAL INTENT AS A MATTER OF LAW MERELY BECAUSE OF THEIR EMPLOYMENT STATUS	12
CONCLUSION	13

APPENDIX

A. Opinion of the United States Court of Appeals for the Seventh Circuit A-1

B. Judgment Order of the United States Court of Appeals for the Seventh Circuit B-1

C. Order Denying Petition for Rehearing by the United States Court of Appeals for the Seventh Circuit C-1

D. District Court Opinion D-1

TABLE OF AUTHORITIES

Cases PAGE

Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894 (1978) 8

Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727 (1982) 4, 8, 9

In re Neagle, 135 U.S. 1, 10 S.Ct. 658 (1890) ... 12

Little v. Walker, 552 F.2d 193 (7th Cir. 1977), *cert. den.* 435 U.S. 932 10

Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806 (1985) 4

Powers v. Lightner, 752 F.2d 1251 (7th Cir. 1985) . 4

Powers v. Lightner, 820 F.2d 818 (7th Cir. 1987) . 1

Statutes

18 U.S.C., Sec. 1962 ..... 2, 3, 4

18 U.S.C., Sec. 1964(c) 3, 4, 12, 13

42 U.S.C., Sec. 1983 ..... 2, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN T. LIGHTNER,
d/b/a LIGHTNER AUTO SALES,

Petitioner,

v.

BARRY JONES and BRUCE WHITE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, John T. Lightner, d/b/a Lightner Auto Sales, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on May 8, 1987.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 820 F.2d 818 (7th Cir. 1987). That opinion is included herein as Appendix A. The opinion of the District Court is not reported, but is attached herein as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered May 8, 1987. A timely Petition for Rehearing, with suggestions for rehearing en banc was denied on August 3, 1987 (Appendix C). This petition has been filed within ninety days of that date. This Court's jurisdiction is invoked pursuant to Title 28, United States Code, Section 1254(1).

STATUTES INVOLVED

Title 42, United States Code, Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Title 18, United States Code, Section 1962

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States

Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . .

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of an unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Title 18, United States Code, Section 1964(c)

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

A.

PROCEDURAL BACKGROUND

In 1982, the petitioner was sued by a customer who had purchased an automobile from him which was later seized by the Illinois State Police acting in cooperation with the F.B.I. Lightner filed a third-party claim against state and federal officials who knowingly and intentionally placed that and other camouflaged stolen vehicles into his hands.[1] The respondents removed the action to the United States District Court for the Northern District of Illinois, Western Division and filed a motion to dismiss or for summary judgment claiming immunity from suit pursuant to *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

The District Court denied the motion and the respondents appealed to the United States Court of Appeals for the Seventh Circuit. The Court of Appeals first dismissed the appeal for the lack of a final order, *Powers v. Lightner*, 752 F.2d 1251 (7th Cir. 1985) then reinstated the appeal in light of *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806 (1985) and reversed the District Court. Lightner's Petition for Rehearing was denied and he now presses the instant Petition for Certiorari.

---

[1] Lightner alleges that the respondents, acting in concert with the Illinois State Police violated his federally protected rights to be secure in and not deprived of his property without due process of law. That claim is founded upon 42 U.S.C. Sec. 1983. He further alleges that the third-party defendants violated 18 U.S.C. Sec. 1962 in that they knowingly engaged a scheme to defraud him of his property in violation of 18 U.S.C. Secs. 1341, and 1343. That claim is founded upon 18 U.S.C. Sec. 1964(c).

B.

FACTS MATERIAL TO THE QUESTIONS PRESENTED FOR REVIEW

John T. Lightner is the sole proprietor of Lightner Auto Sales, a small used car dealership located in Dixon, Illinois. He acquired late model used cars and light trucks from a variety of sources including individuals and automobile auction houses. In 1981 he purchased a number of vehicles from Tremont Auto Auction. Each vehicle had a title which matched the Vehicle Identification Number (V.I.N.) on the dashboard and the V.I.N. on the driver's door sticker (Complaint, pars. 2, 21, 25, 26).

At one point in time Lightner had five cars on his lot which had been acquired from the auto auction. The local police inspected one of the vehicles and reported their suspicions to Lightner that it might be stolen. Lightner asked the police to inspect the other four cars as they had come from the same source (Complaint, pars. 32, 33).

With Lightner's consent, the vehicle was taken to a nearby garage where Illinois State Police Trooper Hutson inspected it. Hutson informed Lightner of his belief that the car was stolen but the next day he called Lightner, informed him that he had made a mistake and said that the car was not stolen and was "OK" for resale (Complaint, par. 37). Thus assured, Lightner sold that vehicle as well as the other four. In fact, all five vehicles had been stolen and "retagged" with V.I.N. plates from wrecked vehicles.

It has since been established that St. Louis F.B.I. agent Jones had called Hutson, told him that the five vehicles were stolen, and asked him to return the vehicles to Lightner. Jones further requested Hutson to tell Lightner

that the cars were not stolen but were suitable for resale by Lightner to his customers (Hutson dep., pp. 40-47).

On a different occasion, Illinois State Trooper Byron Svendsen seized a vehicle at Tremont Auto Auction suspecting it to be stolen. The car was taken to a local garage but released by Svendsen the next day with the statement that it had "checked out" and was not stolen. Thus assured, Lightner purchased the vehicle and later resold it to a retail customer.

It has since been established that Jones called Svendsen and stated that the vehicle was stolen (Svendsen dep., p. 98). Jones asked Svendsen to release the car (Svendsen dep., p. 66), and not arouse any curiosity about it (Svendsen dep., p. 71). Thus, Svendsen returned the car to the auction and later told Lightner, who was interested in purchasing it, that the car had "checked out."

The St. Louis office of the F.B.I. was conducting two Missouri investigations relating to stolen cars. One investigation, known as "Operation Recoupe," involved an undercover "sting" operation in which federal agents sold salvage vehicles (total wrecks which cannot be economically repaired) and titles (or more often, just the V.I.N. plates from the dashboards of salvaged vehicles and matching titles) to known car thieves and "retaggers." The F.B.I. eventually supplied over 115 sets of V.I.N. plates and titles to the car thieves (Wyman dep., p. 45). In all, Lightner purchased ten cars which had been "retagged" with F.B.I. supplied V.I.N. plates. At the conclusion of the operation, Jones asked Svendsen to further participate in the F.B.I. investigation by recovering (seizing from their present possessors) the stolen vehicles which had been taken into Illinois.

Glenn Young, the Special Agent in charge of the St. Louis F.B.I. office has testified that the Recoupe operation had been approved by the F.B.I. Undercover Operations Review Committee in Washington, D.C. (Young dep., p. 25), even though the planners knew in advance of the certainty that it would cause injury to innocent third persons (Young dep., pp. 39-41, 460). Young further admitted that the Bureau had no intention of compensating any of the innocent persons whom they knew were injured by the operation (Young dep., p. 41). He also admitted knowing that Jones' interstate telephone calls and letters to the Illinois State Police were intended to and did have the effect of returning stolen vehicles, which had been seized by the State Police, to the stream of commerce and specifically to Lightner (Young dep., p. 98).

Jones admitted that the Bureau's civil liability to third parties was considered during the planning stages and that Lightner's liability to his customers was a known "problem area" (Jones dep., pp. 24, 26, 73-74). F.B.I. agent Webb discussed the operation's potential for injury to innocent persons with his supervisor, Webb and F.B.I. legal advisor Jim Vermeersch.

Lightner alleges that when the stolen, retagged cars were seized from his customers at the conclusion of the operation, his business was, and continues five years later to be, utterly devastated. His hard earned reputation for honesty and fair play in the small community of Dixon, Illinois has been destroyed (First Amended Complaint, par. 61). Not only was Lightner left by the respondents to salvage his business reputation; he was left to defend legal damage claims, such as the case at bar.

REASONS FOR GRANTING THE WRIT

A.

THIS CASE RAISES THE IMPORTANT QUESTION OF WHETHER GOVERNMENT OFFICIALS, WHO KNOWINGLY AND INTENTIONALLY DEPRIVE A CITIZEN OF HIS PROPERTY, MAY SUCCESSFULLY CLAIM IMMUNITY FROM SUIT PURSUANT TO *HARLOW v. FITZGERALD*, 457 U.S. 800 (1982), UNTIL THE EXACT FACTUAL PREDICATE HAS APPEARED IN A REPORTED DECISION.

This case involved an F.B.I. undercover "sting" operation. The important difference between this one and most others was its certainty from the outset to injure large numbers of innocent citizens. The respondents assisted known auto thieves in entering over one hundred cleverly camouflaged stolen vehicles into the stream of commerce. The respondents could have fully protected the public from loss by having other agents purchase the stolen vehicles when they came up for sale but that would have required the Bureau to spend its funds appropriated by Congress for such purposes. Instead, the respondents permitted private citizens to buy the vehicles and later seized them as contraband. In this manner, the respondents saved Bureau funds by foisting the cost of their operation onto unlucky citizens such as the petitioner.

The District Court found the respondents' operation to be unconscionable. It denied the respondents' motion to dismiss which sought immunity from suit pursuant to *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982). The judge noted that the elimination of the subjective element from the *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894 (1978), test was not intended to expand the respondents' scope of immunity. He quoted this Court's language from *Harlow*.

> By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrance of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. *Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action.* (*Harlow* at p. 2739) (emphasis added).

Despite the fact that *Harlow* eliminated the "good faith" test from the immunity defense, the respondents have pointedly and repeatedly raised it below by claiming that they were involved in a "bona fide" investigation. The District Court noted that there is no "bona fide" investigation defense.

> If the court were to accept this standard, federal defendants would be immunized from liability for *any actions* undertaken in the course of an authorized investigation. This clearly is not the law. Official authorization alone does not establish the objective reasonableness of the defendants' actions. (Appendix D).

Applying *Harlow* to the facts at bar, the District Court found that the respondents reasonably could have been expected to know that their conduct would deprive Lightner of his statutory and constitutional rights.

> The F.B.I. scheme clearly led to Lightner being deprived of property. As to whether a reasonable person would have thought the deprivation would be without due process, we recognize first that due process deals with fairness. It seems that a reasonable person would have known that it was unfair to cause stolen vehicles which would have been intercepted by the Illinois police to remain in the stream of commerce when the natural and probable consequence of this act would be to hurt innocent people.

> This is a situation contemplated by *Harlow*: these defendants should have hesitated before engaging the scheme. (cite) Lightner, as a person who has suffered injury caused by their conduct, may have a cause of action.

The respondents' defense to Lightner's claims is that no decision has specifically held that F.B.I. agents cannot deprive citizens of their property in the context of an undercover operation. The District Court found that argument to be wholly lacking in merit. It relied upon *Little v. Walker*, 552 F.2d 193 (7th Cir. 1977), *cert. den.* 435 U.S. 932.

> While an official "has, of course, no duty to anticipate unforeseeable constitutional developments" (cite) he cannot hide behind a claim that the particular factual predicate in question has never appeared *in haec verba* in a reported opinion. If the application of settled principles to this factual tableau would inexorably lead to a conclusion of unconstitutionality, [a]n official may not take solace in ostrichism. (at p. 197).

The District Judge concluded by holding that,

> the instant case is not based upon a novel theory of constitutional entitlement. It can hardly be disputed that the plaintiff had a right not to be deprived of his property without due process. (App. D).

The Seventh Circuit Court of Appeals reversed the District Court's decision. It first held that,

> until a particular . . . right has been stated so that reasonably competent officers would agree on its application to a given set of facts, it has not been "clearly established" for purposes of *Harlow*. (App. A at p. 3).

The Court of Appeals found no case law to exist which put the respondents on notice that their action was unrea-

sonable. It further found that the respondents' actions did not constitute "egregious" or "truly outrageous" misconduct (App. A at p. 7). Most stunning, however, was the reviewing court's finding that,

> losses by a few [innocent citizens] may be necessary to obtain important evidence . . . (App. A at p. 8).

Indeed the Court of Appeals has created a new defense to recovery for constitutional violations—necessity. It held that where a defendant can assert that a constitutional deprivation was "necessary" in order to obtain "important evidence" against third persons an injured, innocent citizen has no remedy. The opinion concluded by rejecting two hundred years of case law interpreting the Fifth Amendment.

> It is an unfortunate consequence of achieving what is for the overall good of the public that some [uncompensated] property loss may occur to presumably innocent individuals. (App. A at p. 8).

The dissenting opinion by Judge Minor Wisdom succinctly states the issue: who should bear the cost of this government operation?

> The sad fact is that in Operation Recoupe the F.B.I. victimized innocent citizens by knowingly selling stolen cars and now refuses to reimburse the purchasers. The costs of such an operation should be borne by the United States government, not by the innocent victims. (App. A at p. 13).

B.

THIS CASE RAISES THE IMPORTANT AND UNSETTLED QUESTION OF WHETHER GOVERNMENT OFFICIALS, WHO KNOWINGLY ENGAGE A SCHEME TO DEFRAUD A SPECIFIC CITIZEN OF HIS PROPERTY, LACK CRIMINAL INTENT, AS A MATTER OF LAW, MERELY DUE TO THEIR EMPLOYMENT STATUS.

The petitioner makes an alternate claim for relief under 18 U.S.C. Sec. 1964(c). He asserts that the respondents engaged in a scheme to defraud him and many other persons of their property and utilized interstate wires and the mails in execution of that scheme to defraud. There is ample evidence to support the mail and wire fraud charges were the respondents private citizens. The facts and documents supporting these claims may be found in Lightner's briefs in opposition to the respondents' motion to dismiss or for summary judgment.

The Court of Appeals held that Lightner could not establish criminal intent for his RICO claims (App. A at p. 2). The opinion omits any discussion of the pertinent facts. Thus, the sole conclusion to be drawn is that the Court of Appeals found that F.B.I. agents who are engaged in an undercover operation cannot, as a matter of law, possess criminal intent for any of their acts.

From the petitioner's perspective, it makes no difference whether a thief in the night takes his property or the F.B.I. does so pursuant to an undercover operation. The result is the same. His property is gone; he has suffered a loss. The legal issue is whether these federal agents were, a) doing an act they were authorized by law to do; and, b) if they were doing an authorized act did they do no more than was "necessary and proper", *In re Neagle*, 135 U.S. 1, 10 S.Ct. 658 (1890).

Giving the respondents the benefit of the doubt, they were doing what they were authorized by law to do—i.e., investigate crime. The issue remains, however, as to whether or not the respondents did no more than was "nesssary and proper." If they went beyond those bounds, they may be charged for criminal violations of the law. The petitioner asserts that the respondents' actions were patently unnecessary and constitutionally improper. Thus, they may be sued under 18 U.S.C. Sec. 1964(c) for damages. Petitioner's RICO claims should be reinstated for appropriate consideration.

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

JOHN A. DIENNER, III
LYDON & GRIFFIN
A Professional Corporation
100 West Monroe Street
Eighteenth Floor
Chicago, Illinois 60603
(312) 346-9538
Attorney for Petitioner

November 2, 1987

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 84-2312

ANNE POWERS,

Plaintiff,

v.

JOHN T. LIGHTNER, d/b/a LIGHTNER AUTO SALES,

Defendant, Third-Party Plaintiff-Appellee,

v.

BARRY JONES and BRUCE WHITE,

Third-Party Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Western Division.
No. 82 C 20080—**Stanley J. Roszkowski,** *Judge.*

ARGUED NOVEMBER 7, 1984—DECIDED MAY 8, 1987

Before FLAUM, *Circuit Judge,* and WISDOM* and PELL, *Senior Circuit Judges.*

* Judge John Minor Wisdom, Senior Circuit Judge of the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

PER CURIAM. In accordance with the result reached in the respective opinions of Judge Flaum and Judge Pell, the judgment of the district court is reversed and the cause is remanded for further proceedings in accordance with the following opinions.

PELL, *Senior Circuit Judge.* Two federal officials appeal from an order of the district court denying their motion for summary judgment on qualified immunity grounds. We first held that the district court's order was not an appealable interlocutory order, *Powers v. Lightner*, 752 F.2d 1251 (7th Cir. 1985), but in light of *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806 (1985), which held that such an order is an appealable final decision notwithstanding the absence of a final judgment, we vacated our earlier judgment. Because the federal officials should have been entitled to summary judgment on qualified immunity grounds, we reverse the district court's order and remand for further proceedings consistent with this opinion.

In this opinion, I do not reach Lightner's argument that the Government's action was a taking for which just compensation would have been required.[1] Furthermore, while this circuit has consistently held that the Racketeer Influenced and Corrupt Organizations Act (RICO) must be given the broad effect mandated by its plain language, *see, e.g., Morgan v. Bank of Waukegan*, 804 F.2d 970, 974 (7th Cir. 1986), because Lightner failed to allege facts sufficient to make out the element of criminal intent in his RICO claim, this claim should have been dismissed by the district court. *See Baucom v. Martin*, 677 F.2d 1346, 1350 (11th Cir. 1982). I consider here only the issue of qualified immunity.

---

[1] The district court did not address this issue. Yet the Government's failure to stop injury to property does not constitute a taking under the Fifth Amendment. *See National Board of YMCA v. United States*, 395 U.S. 85 (1969). We refuse to create such a novel cause of action in Lightner's case. *See generally Andrus v. Allard*, 444 U.S. 51, 64-68 (1979).

I.

Because this court previously discussed the facts of this case in our original opinion, *Powers*, 752 F.2d at 1252-53, I need to only repeat those facts necessary for our disposition on appeal. The principal issue before us, now that we know from *Mitchell* that we have an appealable order, is whether Jones and White in this case had qualified immunity. In my opinion, they did.

From October 1980 through March 1982, the St. Louis FBI office conducted an undercover criminal investigation, known as "Operation Recoupe," into stolen vehicle enterprises. Operation Recoupe was described in *Georgia Casualty and Surety Co. v. United States*, 582 F. Supp. 49 (E.D. Mo. 1984). The FBI operated a vehicle salvage yard in which agents purchased auto wrecks with valid titles and vehicle identification number (VIN) tags from cooperating insurance companies. These agents then sold the wrecks with the VINs and titles to targeted suspects who allegedly ran a "retagging" business. These suspects distributed the cars to auctioneers. The cars were then bought by used cars dealers and ultimately sold to the public.

In June 1981, FBI Special Agent Barry Jones provided a VIN tag and title for a Chevrolet Monte Carlo to David Lauck, a used car dealer also working as a FBI informant. Lauck put the tags and title on a stolen Monte Carlo which would subsequently be auctioned through the Tremont Auto Auction. An Illinois State trooper noticed this car, independently suspecting that it and a second car might have been stolen, and he took the cars to his station. Lauck alerted Jones, who telephoned the trooper and informed him of the undercover operation. The trooper returned the cars to Tremont and told the auctioneer that the cars were not stolen.

Lightner Auto Sales purchased the Monte Carlo at the auction and then resold it to Anne Powers. This car was seized at the end of Operation Recoupe and returned to its proper owner. Powers sued Lightner for a refund in state court, and Lightner then filed a third party action

against the auto auction, the U.S. Attorney General, Jones, Lauck, Assistant U.S. Attorney Bruce White, and several Illinois police officers, seeking damages under 42 U.S.C. § 1983 for deprivation of property without due process. Lightner also alleged a RICO claim against the federal defendants, who removed the case to district court.

The district court granted the motion to dismiss the Attorney General but denied it as to Jones and White. *Lightner v. Tremont Auto Auction, Inc.*, 564 F. Supp. 1112 (N.D.Ill. 1983). Jones and White now appeal from those portions of the order denying their request for summary judgment on the ground of qualified immunity.

The two federal officials claim that they are entitled to qualified immunity, an affirmative defense on which they carry the burden of proof. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). Qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow*, 457 U.S. at 818; *Davis v. Scherer*, 468 U.S. 183, 194 n.12 (1984).

The standard that the federal officials must meet is an objective one. It is irrelevant whether either defendant knew at the time he acted or failed to act that his actions violated someone's constitutional rights. *Kompare v. Stein*, 801 F.2d 883, 887 (7th Cir. 1986); *Bates v. Jean*, 745 F.2d 1146, 1151 (7th Cir. 1984). Until a particular constitutional right has been stated so that reasonably competent officers would agree on its application to a given set of facts, it has not been "clearly established" for purposes of *Harlow*. *See Benson v. Allphin*, 786 F.2d 268, 275-76 (7th Cir.), *cert. denied*, 107 S. Ct. 172 (1986). Moreover, as this court recently held, "The words 'clearly established . . . constitutional rights' may not be used to read the defense of immunity out of federal tort law by the facile expedient of stating constitutional rights in the most general possible terms. . . . The right must be sufficiently particularized to put potential defendants on notice that their conduct probably

is unlawful." *Azeez v. Fairman*, 795 F.2d 1296, 1301 (7th Cir. 1986); *see also Chapman v. Pickett*, 801 F.2d 912, 920 (7th Cir. 1986) (Easterbrook, J., dissenting).

The task is to re-examine the law in light of plaintiff's allegations and supporting evidence to decide if the alleged constitutional violation was "clearly established" at the time the incidents occurred. *Wade v. Hegner*, 804 F.2d 67, 70-71 (7th Cir. 1986). Closely analogous cases, those decided before the defendants acted or failed to act, are required to find that a constitutional right is clearly established. *Lojuk v. Johnson*, 770 F.2d 619, 628 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 822 (1986). My research has failed to disclose any cases indicating that Lightner had a constitutional right to have the two federal officials notify him that the Monte Carlo he was buying was part of the operation. Nor did Lightner have a right to compensation from them for the loss of his automobile.

The law controlling this issue has been quite unsettled. *Johnson v. Breljc*, 701 F.2d 1201 (7th Cir. 1983). Therefore, "[i]n the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established under *Harlow*." *Capoeman v. Reed*, 754 F.2d 1512, 1514 (9th Cir. 1985). A review of these cases should focus only on rights clearly established in their respective contexts, *Crowder v. Lash*, 687 F.2d 996, 1007 (7th Cir. 1982), and this court must not expect reasonable government officials "to recognize the significance of a few scattered cases from disparate areas of the law for a right that is just evolving." *Lojuk*, 770 F.2d at 628. No analagous cases point to any of Lightner's claimed rights or the federal officials' corresponding duties.

In *Redmond v. United States*, 518 F.2d 811 (7th Cir. 1975), the Securities and Exchange Commission permitted the plaintiff to be defrauded by a con man. This court rejected the plaintiff's contention that the "national government may be held liable for damages resulting from criminal conduct," and we held that there is no "legally-

enforceable duty on the part of the Government to warn or to compensate victims of criminal activity." *Id.* at 816. Lightner's situation is remotely analogous to *Redmond*, for the Government here need not have warned him of the sting nor compensate him for the loss of the Monte Carlo. This lack of duty comes from the Government's role as an enforcer in the undercover operation which had to be kept absolutely secret to preserve the sting's success. Lightner has failed to demonstrate that the Government could have notified potential innocent buyers such as Lightner that the automobile in question was stolen without jeopardizing the entire operation. *See Georgia Casualty and Surety Company*, 582 F. Supp. at 51. Here the law enforcement officials appeared to choose the alternative presented by public versus private interests that would result in the least amount of harm, *United States v. Brown*, 635 F.2d 1215 (7th Cir. 1980), and they wisely recommended that the Illinois State trooper stop intervening in the matter.

A second analogous case is *Beard v. Mitchell*, 604 F.2d 485 (7th Cir. 1979), where the question was whether an FBI agent had a duty to prevent a murder. In that *Bivens* action, the court held that the plaintiff had to demonstrate the defendant's recklessness, i.e., the defendant had to act with the knowledge that its conduct was unreasonable or culpable. *Id.* at 495. The court distinguished the situation in *United States v. Bonner*, 545 F.2d 565 (7th Cir.), *cert. denied*, 435 U.S. 932 (1977), where intentional conduct was an element of the civil rights claim. Recently, this court has acknowledged that "it would be illogical to extend good faith immunity to a government official who has intentionally violated an individual's constitutional rights." *Perry v. Larson*, 794 F.2d 279, 284 n.1 (7th Cir. 1986). I cannot hold that White and Jones intentionally tried to deprive Lightner of his property even though it turned out that was the fallout of the sting operation. The agents did intervene to prevent the Illinois State trooper from impounding the automobiles he suspected were stolen. This action, however, was not sufficient to put this case in the ambit of those involving an intentional violation of

due process. *See Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983) (discussing distinction between negligent and intentional conduct).

The inquiry is not over, however, for this court must apply the *Harlow* standard to see if the defendants' actions were objectively reasonable. In balancing the interests of Lightner to receive compensation and damages for the loss of his car with the interests of the Government in maintaining a successful undercover sting operation, the "facts of the existing case law must closely correspond to the contested action before the defendant official is subject to liability under *Harlow*." *Benson*, 786 F.2d at 276. My review of the case law reveals no closely analogous decisions which should have indicated to the officials that their conduct in the undercover operation was unreasonable.

This balancing test, on the other hand, reaches a "foregone conclusion" favoring injured parties in the event of an "egregious situation." *Benson*, 786 F.2d at 276 n. 18. The question remains, however, whether the alleged governmental misconduct here was so "truly outrageous" as to indicate a due process violation. *United States v. Kaminski*, 703 F.2d 1004, 1009 (7th Cir. 1983). I do not believe it was. In order to detect the retagging operation, the agents needed to participate in the unlawful practices. *See United States v. Russell*, 411 U.S. 423, 432 (1973). In the situation presented here, the law enforcement conduct—intervening to prevent a trooper from perhaps frustrating a major investigation—certainly stops short of violating that "fundamental fairness, shocking to the universal sense of justice," mandated by the Due Process Clause of the Fifth Amendment. *Kinsella v. United States*, 361 U.S. 234, 246 (1960).

While I recognize that a few innocent citizens such as Lightner may have suffered individual losses due to Operation Recoupe, I believe this court should refuse to hold the FBI agents and U.S. Attorneys liable for their good-faith conduct in giving priority to the maintenance of secrecy

for the sting operation. In such an undercover investigation, losses by a few may be necessary to obtain important evidence to prevent future crimes suffered by the general public. The manner in which our prisons are filling to the point of overcrowding graphically demonstrates the necessity of governmental resort to procedures that at an earlier time would have been deemed, if not intolerable, at least beneath the dignity of the Government. One might venture to say that the general welfare is involved. A frequent example is the use of informants who themselves have a criminal background and, indeed, commit crimes while acting on behalf of the Government. Yet the success of these methods in fighting crime, including the one of the type here involved, has been repeatedly demonstrated. It is an unfortunate consequence of achieving what is for the overall good of the public that some property loss may occur to presumably innocent individuals.

For the reasons cited above, both Special Agent Jones and Assistant U.S. Attorney White were entitled to qualified immunity for their participation in Operation Recoupe. The standard that the plaintiff attempted to impose on both officials was not "clearly established" under existing caselaw. The nature of undercover criminal investigations like Operation Recoupe is such that federal officials must be given the freedom in which to exercise their discretion in ensuring the success of their sting operations. There is no genuine issue of material fact, and both Jones and White were entitled to judgment as a matter of law.

FLAUM, *Circuit Judge*, concurring in the judgment. The precise issue presented in this appeal is whether the federal officers involved are qualifiedly immune from suit. To decide this issue, we are obliged to examine whether injuries to innocent victims of federal undercover investigations may violate the Fifth Amendment's Due Process Clause. I conclude that it is unnecessary to definitively resolve this particular inquiry in the context of this case.[1] Although Judge Wisdom's dissent is constitutionally appealing, because this precise due process question has not been previously addressed by any federal court, I conclude that the officers involved are immune from suit. I therefore join Judge Pell in reversing the judgment of the district court.

I.

The Supreme Court has recently spoken in the area of qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982). In *Harlow* the Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 2738. This court recently stated that "whenever a balancing of interests is required the facts of the existing case law must closely correspond to the contested action before the defendant official is subject to liability under . . . *Harlow*." *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir.), *cert. denied*, 107 S. Ct. 172 (1986). Furthermore, for officials to lose their qualified immunity, *Harlow* requires that the constitutional rights in question must be clearly established; this means that the "right must be sufficiently particularized to put potential defendants on notice that their conduct probably is unlawful." *Azeez v. Fairman*, 795 F.2d 1296, 1301 (7th Cir.

[1] The facts underlying this suit are fully discussed in Judge Pell's opinion and will not be repeated here.

1986). Under *Harlow's* objective standard, any due process rights that Lightner may have possessed were not clearly established at the time of the alleged injury in this case.

This court in *Benson* noted that there may be "a situation in which the defendant's actions are so egregious that the result of the balancing test will be a foregone conclusion, even though prior caselaw may not address the specific facts at issue." *Benson*, 786 F.2d at 276 n.10. I do not believe that this is a case where the defendants' conduct is so egregious as to strip them of their qualified immunity. However, if a future case with more compelling facts than this situation should arise, the defendants might not be so shielded.

II.

I therefore conclude that we need not resolve whether or not any of Lightner's possible due process rights, as guaranteed by the Fifth Amendment, have been violated. I find that any possible due process rights Lightner may have under the facts of this case were not "clearly established," as required by *Harlow*; thus, the defendants are immune from suit in this case.

WISDOM, *Senior Circuit Judge.* I respectfully dissent.

The government's discretion to conduct undercover investigations, although necessarily broad, is not unlimited. The due process clause protects even criminal defendants against "truly outrageous" government misconduct.[1] As the Supreme Court observed in *Stanley v. Illinois*,[2] "one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."[3]

I would hold that the FBI exceeded the limits of its discretion. Had the FBI not intervened directly, the car in question would not have been sold to an innocent purchaser. This case therefore differs from the more usual case in which the FBI simply participates in an ongoing criminal enterprise without causing additional crime.

The substantive due process right implicated in this case requires a balancing of interests. On the one hand is the government's interest in discovering and prosecuting criminals. On the other hand is the citizen's right not to be the victim of a crime created wholly by the government. Officials of the FBI have long known that their conduct during an undercover operation may invade the due process rights of citizens involved in the investigation. For example, targets of the investigation may not be entrapped.[4] The FBI knew that civil liability may attach for particularly egregious conduct in entrapment cases.

I am confirmed in my conclusion that the FBI's handling of Operation Recoupe or Recoup was "truly outrageous" by the criticism it has generated in the public and in Con-

---

[1] *United States v. Kaminski*, 703 F.2d 1004 (7th Cir. 1983).

[2] 405 U.S. 645 (1972).

[3] *Id.* at 656.

[4] *See United States v. Kaminski*, 703 F.2d 1004 (7th Cir. 1983).

gress. Recoupe and other operations similar to it have been the subject of critical newspaper articles and congressional hearings.[5] The Subcommittee on Civil and Constitutional Rights of the Judicial Committee of the House of Representatives investigated Operation Recoup among other undercover operations. The subcommittee had this to say about the sting operation:

> In Operation Recoup a 1981 investigation of stolen car racketeering in the South and Midwest, the Bureau apparently used its own agents to set up a bogus used car business, Le Blanc Motors, in which wrecked cars were sold to "retaggers" who then replaced the motor vehicle identification tags on stolen automobiles with those of the wrecked vehicle. FBI agents also operated as intermediaries in several sales of stolen and retagged automobiles to used car dealers. Those sales were made with the knowledge that the cars would be subsequently resold to innocent purchasers who would ultimately lose title to them.[6]
>
> As of October 1982 more than 250 cars had been confiscated from innocent purchasers.[7] In addition, of course, the business reputations of the dealers who sold the automobiles have been irreparably injured. Operation Recoup has spawned a number of lawsuits

---

[5] The Washington Post, August 3, 1985, at A3; The Times-Picayune/The States-Item, June 12, 1986, at A-14; FBI Undercover Operations, H.R. Doc. No. 98-267, 98th Cong., 2nd Sess. (1984).

[6] "Asked after the investigation whether the operation could not but harm innocent people, the Assistant Special Agent in Charge of the St. Louis FBI office responded affirmatively. Rockford (Ill.) Register Star, p. 1a". H.R. Doc. 98-267, 98th Cong. 2nd Sess. (1984), p. 22 n.51.

[7] Wall Street Journal, October 7, 1982, p. 1.

claiming millions of dollars in damages by innoct sellers and purchasers of stolen automobiles.[8]

H. R. Doc. 98-267, 98th Cong., 2nd Sess. (1984), p. 22.

The sad fact is that in Operation Recoupe the FBI victimized innocent citizens by knowingly selling stolen cars and now refuses to reimburse the purchasers. The costs of such an operation should be borne by the United States government, not by the innocent victims.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[8] Claims in excess of $47 million have been filed against the United States as a result of Operation Recoup, none of which have been settled (see "FBI Undercover Activities," *supra*, at 457). Here, too, the Department of Justice has resisted all efforts to disclose through discovery the FBI's role. (December 22, 1983 telephone conversation with attorney for the defendant, third party defendant in *Powers v. Lightner*, U.S. District Court, Northern District of Illinois, Western Div. 82 C 20080, and *Powers v. Lightner*, Court of the Fifteenth Judicial Circuit, Lee County, Illinois, No. 22-LM 16.) H.R. Doc. 98-267, 98th Cong., 2nd Sess. (1984), p. 22 n.52.

APPENDIX B

JUDGMENT – ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

May 8, 1987

Before

Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. JOHN MINOR WISDOM, *Senior Circuit Judge**
Hon. WILBUR F. PELL, *Senior Circuit Judge*

No. 84-2312

ANNE POWERS,

Plaintiff,

vs.

JOHN T. LIGHTNER, d/b/a LIGHTNER AUTO SALES,

Defendant and Third-Party Plaintiff-Appellee,

vs.

BARRY JONES and BRUCE WHITE,

Third-Party Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Western Division.
No. 82 C 20080—**Stanley J. Roszkowski,** *Judge.*

* Judge John Minor Wisdom, Senior Circuit Judge of the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Western Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED, with costs, and the cause is REMANDED, in accordance with the opinion of this Court filed this date.

APPENDIX C

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

August 3, 1987

Before

Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. JOHN MINOR WISDOM, *Senior Circuit Judge**
Hon. WILBUR F. PELL, JR., *Senior Circuit Judge*

ANNE POWERS,

Plaintiff,

No. 84-2312 vs.

JOHN T. LIGHTNER, d/b/a LIGHTNER AUTO SALES,

Defendant and Third-Party Plaintiff-Appellee,

BARRY JONES and BRUCE WHITE,

Third-Party Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Western Division.
No. 82 C 20080—**Stanley J. Roszkowski**, *Judge.*

---

* Judge John Minor Wisdom, Senior Circuit Judge of the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by the third-party plaintiff-appellee, a majority of the judges on the original panel having voted to deny the petition for rehearing** and none of the active members of the court having requested a vote on the suggestion for rehearing en banc,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing with suggestion for rehearing en banc be, and the same is hereby DENIED.

** Judge Wisdom would have granted the petition for rehearing.

APPENDIX D

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

Presiding Judge: Honorable STANLEY J. ROSZKOWSKI

Cause No.: 82 C 20080 Date: June 29, 1984

Title of Cause: John Lightner vs. Tremont Auto Auction, Inc.

ORDER

* * * * *

Defendants renewed motion to dismiss or for summary judgment is granted with respect to the common law torts alleged in Counts V and VI, and denied with respect to the remaining Counts. (DRAFT).

/s/ J. ROSZKOWSKI

D-2

[Dated June 29, 1984]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

JOHN T. LIGHTNER, d/b/a Lightner Auto Sales,

Third-Party Plaintiff,

No. 82 C 20080 vs.

TREMONT AUTO AUCTION, INC., et al.,

Defendants.

ORDER

Before the court is defendants' renewed motion to dismiss or for summary judgment. The court's jurisdiction is invoked pursuant to 28 U.S.C. § 1331. For the reasons set forth herein, the defendants' motion is granted in part and denied in part.

I. FACTS

John T. Lightner, doing business as Lightner Auto Sales, initiated the instant third-party complaint against Assistant United States Attorney Bruce White ("White"), and St. Louis F.B.I. Agent Barry Jones ("Jones"), (together referred to as the "federal defendants"). Since the court's ruling on the federal defendants' motion to dismiss, additional facts have been presented which warrant a restatement of the facts giving rise to this complaint. *See Lightner v. Tremont Auto Auction, Inc.*, 564 F.Supp. 1112 (N.D. Ill. 1983).

The complaint stems from two separate criminal investigations into stolen vehicle enterprises conducted by the St. Louis FBI Office. "Operation Recoupe" was an under-

cover operation in which the FBI operated a vehicle salvage yard in the St. Louis, Missouri area. Salvage vehicles were purchased from insurance companies and then sold to targeted subjects. In most instances, only the certificate of title and matching Vehicle Identification Number (VIN) tags were sold.

The VIN tags were subsequently used to replace those on stolen vehicles of a similar description. The certificates of title for the salvage vehicles would thereby correspond to the VIN tags on the stolen vehicles. This "retagging" process gave the stolen vehicles the appearance of legitimacy.

During the same time period, defendant Jones was conducting a separate ongoing investigation concerning the owner of a St. Louis auto auction, Leroy Morton. (Morton Operation). In the course of this operation Jones utilized David Locke as a confidential informant on the criminal activities of Morton and his associates. The two investigations became somewhat intertwined because one of Morton's associates was also a target of the Recoupe Operation.

Locke's primary role was to sell the retagged vehicles received from the Morton group. Locke also supplied the Morton groupe with VIN tags and titles obtained from the FBI. One outlet commonly used by Locke was G.T.O. Auto Brokers, Inc. GTO then sold or consigned the vehicles to Tremont Auto Auction, Inc. ("Tremont") in Peoria, Illinois. Lightner purchased eight of those stolen vehicles for resale to his retail customers.

On May 4, 1981, William Killian, a Dixon Illinois police officer visited Lightner Auto Sales to inspect a 1979 Trans-Am which Lightner had purchased at Tremont. Killian informed Lightner that the vehicle appeared to be stolen. Lightner requested that Killian also run a check on the other cars he purchased at Tremont.

A few days later Killian returned to Lightner Auto Sales accompanied by Jean Hutson, an Illinois State Police Officer. Officer Hutson sought permission to have the car

removed to a garage for further inspection. Lightner readily complied with the request.

The officer's inspection revealed that the subject vehicles were stolen. On May 7, 1981, while the vehicles were under inspection, FBI Agent Jones telephoned Officer Killian and Lieutenant William Ostergrant, also a Dixon Police Officer. They were informed of the ongoing FBI undercover scheme and Jones requested them to end their investigation of the cars.

Shortly thereafter, the TransAm was returned to Lightner. Officer Hutson informed Lightner that the TransAm was not stolen. Lightner was also told that the other vehicles had checked out "OK" and he was free to sell them.

Plaintiff also alleges another instance in which certain of these vehicles were nearly removed from the stream of commerce by the Illinois State Police, but, instead, resulted in Lightner once again unwittingly dealing in stolen vehicles. Byron Svendson, an Illinois State Police Officer, visited Tremont Auto Auction on June 10, 1981, and impounded two cars as stolen. FBI Agent Jones telephoned Officer Svendson on June 11, 1981. He revealed that the cars were in fact stolen and apprised Svendson of the undercover operation. Upon Jones' request, the vehicles were released without notifying the owner that they were stolen and one of the cars was later sold to Lightner.

Some five months later, Lightner finally discovered the vehicles he had sold were stolen. Officer Hutson presented Lightner with a list of VIN's belonging to vehicles Lightner had sold—including the previously mentioned vehicles—and directed Lightner to recall the vehicles. If the vehicles proved to be stolen, Lightner was also instructed that he should provide loaner cars to his customers, purchase the cars from the insurance companies who had paid claims on them, and then return the vehicles to his customers. When Lightner refused to comply, Hutson allegedly threatened retaliation.

Hutson allegedly informed Lightner that unless he cooperated, certain undesirable "police tactics" would be employed; specifically, Hutson warned that marked police cars and uniformed officers would be used to seize the vehicles from Lightner's customers and the cars would be forcefully taken from the customers' residences or places of business. Such a procedure is alleged to have actually been followed with respect to two of the vehicles Lightner sold.

It is on the basis of these facts that Lightner brought this action. Counts III through VII of the plaintiff's complaint deal with the federal defendants. Count III alleges a deprivation of property without due process of law in violation of the Fifth Amendment, Count IV is a violation of 41 U.S.C. § 1983, Count V malicious interference with business, Count VI invasion of privacy, and, Count VII a violation of the Organized Crime Control Act of 1970, specifically the Racketeer Influenced and Corrupt Organizations (RICO) provisions of 18 U.S.C. § 1961 *et seq.*

II. OFFICIAL IMMUNITY

The federal defendants motion is based primarily upon the doctrine of official immunity. The scope of immunity available to government officials varies depending upon the nature of the claim asserted and the functions of the officials challenged. Such protection is intended to shield public officers from undue interference with their duties and from potentially disabling threats of liability. *Harlow v. Fitzgerald,* 457 U.S. 800 (1982).

In the instant case, the federal defendants claim absolute immunity from suit with respect to the malicious interference with business and invasion of privacy claims, as well as the racketeering violations. It is also asserted that absolute prosecutorial immunity bars all claims against defendant White. As to the due process violations alleged in Counts III and IV, the defendants raise the defense of qualified immunity.

A. *Absolute Immunity From Common Law Torts*

In *Barr v. Matteo*, 360 U.S. 564 (1959), a plurality of the Court held that a government official performing discretionary functions within the outer perimeters of his line of authority was absolutely immune from a civil libel suit stemming from those actions. *See also Spalding v. Vilas*, 161 U.S. 483 (1896). The immunity from common law tort liability extends to both lower and upper level federal officials. *George v. Kay*, 632 F.2d 1103 (4th Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981). An act lies within the outer perimeters of an official's authority so long as it bears some reasonable relation to and connection with his duties and responsibilities. *Scherer v. Brennan*, 379 F.2d 609, 611 (7th Cir.), *cert. denied*, 389 U.S. 1021 (1967).

Counts V and VI of the plaintiff's complaint allege malicious interference with business and invasion of privacy, respectively. These are common law torts subject to dismissal so long as the federal defendants were acting within the scope of their authority.

Affidavits have been submitted by the federal defendants and their immediate supervisors, Joseph B. Moore and Glenn L. Young. These affidavits indicate that the allegations in the complaint relate to acts performed by the federal defendants within the scope of their employment. The plaintiff has offered no evidence to suggest that the federal defendants were acting outside the scope of their official duties.

The plaintiff apparently concedes the applicability of *Barr* as he has made no response whatsoever to the federal defendants' claim that absolute immunity bars all state common law tort claims. As the federal defendants have demonstrated that the actions complained of were within the outer perimeters of their scope of authority, they are entitled to absolute immunity with respect to the state law claims in Counts V and VI.

The federal defendants assert that the plaintiff's RICO claim (Count VII) is similarly barred by absolute immunity because of its nonconstitutional nature. A similar argu-

ment was presented in *Windsor v. The Tennessean*, 719 F.2d 155 (6th Cir. 1983). *Windsor* involved a suit against a former U.S. Attorney brought under 42 U.S.C. § 1985(1) for conspiring to defame a subordinate and to effect his discharge. The Sixth Circuit expressly rejected the notion that claims of federal statutory violations instituted against government officials should be governed by the same rule as common law tort claims. Rather, the court held that the U.S. Attorney was entitled to assert only a qualified immunity from such claims.

The federal defendants' reliance upon *Lawrence v. Acree*, 665 F.2d 1319 (D.C. Cir. 1981) (*per curiam*) is misplaced. *Lawrence* also involved a Section 1985(1) claim instituted by a former federal employee against his superiors for conspiring to force him to resign. While the court held that absolute immunity barred the plaintiff's federal statutory tort claim, the basis for its decision was not the nonconstitutional nature of the claim. The court concluded that under the particular circumstances in that case, absolute immunity was "essential to the conduct of public business." 665 F.2d at 1326 (*quoting Butz v. Economou*, 438 U.S. 478, 507 (1978)).

Furthermore, in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) presidential aides charged with violating both plaintiff's constitutional and federal statutory rights were held to be entitled only to a qualified immunity from suit. *See also Hampton v. Hanrahan*, 600 F.2d 600, 632, 634 (7th Cir. 1979), *modified on other grounds*, 446 U.S. 754 (1980).

B. *Absolute Prosecutorial Immunity*

In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Supreme Court held that a public prosecutor has absolute immunity "in initiating a prosecution and in presenting the state's case." *Id.* at 431. These activities, the Court noted, are "intimately associated with the judicial phase of the criminal process, and thus [are] functions to which the reasons for absolute immunity apply with full force." *Id.* at 430.

Focusing on the functional nature of the activities rather than the status of the prosecutor, the lower federal courts have held that certain official actions by prosecutors are entitled only to qualified immunity. *See, e.g., Hampton v. Hanrahan*, 600 F.2d 600, 632-33 (7th Cir.), *cert. denied*, 446 U.S. 754 (1979) (*per curiam*) (participation in planning and execution of an illegal police raid, dissemination of prejudicial information to media); *Halperin v. Kissinger*, 606 F.2d 1192, 1208 (D.C. Cir. 1979), *aff'd by an equally divided court per curiam*, 452 U.S. 713 (1981) (prosecutor's authorization of illegal investigative techniques); *Apton v. Wilson*, 506 F.2d 83, 92, 93-94 (D.C. Cir. 1974) (policy-making and supervisory participation in illegal arrests during May Day demonstrations).

When a prosecutor is performing a purely advocatory function, the courts consistently hold that he is entitled to absolute immunity. *See, e.g., Taylor v. Kavanagh*, 640 F.2d 450, 452 (2d Cir. 1981) (plea bargaining); *Daniels v. Kieser*, 586 F.2d 64 (7th Cir. 1978), *cert. denied*, 441 U.S. 931 (1979) (issuance of warrants to ensure a witnesses' attendance at trial); *Heidelberg v. Hammer*, 577 F.2d 429, 432 (7th Cir. 1978) (destruction of evidence). The difficulty lies in determining whether alleged prosecutorial misconduct is properly characterized as advocatory, investigative or administrative.

In the instant case, Assistant U.S. Attorney White is alleged to have rendered legal advice concerning various aspects of the undercover FBI operation. White argues that this conduct is advocatory and he is therefore entitled to absolute prosecutorial immunity. The federal defendants rely on the Seventh Circuit's decision in *Goldschmidt v. Packett*, 686 F.2d 582 (7th Cir. 1982). In *Goldschmidt*, the court held that a prosecutor who sent a letter threatening prosecution was absolutely immune from suit. The Court noted that "the prosecutor's actions were not investigative and were not the sort of activity which could be performed by a layman with the same effectiveness that a letter from the prosecutor's office would accomplish." Since a layman cannot render legal advice, de-

fendants conclude that White's conduct must be protected by absolute immunity.

This argument is without merit. While a prosecutor in his role as advocate may often take actions outside the courtroom preliminary to the initiation of a prosecution, *Imbler* emphasized that absolute immunity is only warranted for those activities "*intimately associated with the judicial phase of the criminal process.*" 424 U.S. at 431 (emphasis added). White's conduct in the present case bears little or no relation to the advocate's role envisioned by the Supreme Court in *Imbler*. The actions challenged are far too attenuated from the judicial phase of the criminal process to merit absolute immunity. No criminal prosecution had been initiated, nor was White's advice sought in regards to whether to initiate a particular prosecution.

Contrary to the defendant's assertion, White's actions are not comparable to the prosecutor in *Goldschmidt*. The decision to send a letter threatening prosecution is closely related to the prosecutor's decision whether to initiate a prosecution and what charges to bring. The rendering of legal advice by a prosecutor concerning various aspects of an FBI investigation falls outside the scope of the advocatory prosecutorial conduct protected by *Imbler*. It is far more analogous to the prosecutors' actions in *Hampton*, 600 F.2d 600, *Halperin*, 606 F.2d 1192, and *Apton*, 506 F.2d 83. Accordingly, this court concludes that White is only entitled to qualified immunity.

C. *Qualified Immunity*

In *Butz v. Economou*, 438 U.S. 478 (1978), the Supreme Court established that generally federal officials are only protected by a qualified immunity from suits alleging constitutional violations. *Butz* reaffirmed the general rule that a federal official may not act with impunity while ignoring the limitations which the Constitution has imposed upon his authority. *Id.* at 495. The court observed that in situations involving abuse of office, an action for damages against an official may be the only means available

for the vindication of constitutional guarantees. *Id.* at 506. Nevertheless, some measure of protection from personal liability arising out of the performance of official duties was deemed essential to ensure the effective functioning of government. Qualified immunity was recognized to effect a compromise between these competing interests.

The scope of the qualified immunity defense was delineated by the Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). A purely objective standard was established for evaluating an official's conduct. The court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

In ruling upon a motion for summary judgment, *Harlow* directs a court to determine whether the rights allegedly violated were clearly established at the time the challenged conduct occurred. If the law defining those rights was clearly established, the qualified immunity defense ordinarily should fail, since a reasonably competent public official is expected to know the law governing his conduct. *Id.* at 818-19. Nevertheless, the public official may still prevail on the immunity defense if he can demonstrate that due to extraordinary circumstances he neither knew nor should have known of the relevant legal standard. This court's inquiry is thus directed solely to the objective legal reasonableness of these federal defendants' actions.

Count III of the plaintiff's complaint alleges a deprivation of property without due process of law in violation of the Fifth Amendment. At the outset, the federal defendants maintain that the plaintiff has not stated a valid constitutional claim. They first assert that they owed no legal duty as law enforcement officers to warn the plaintiff of potential criminal conduct. *See Redmond v. United States Securities & Exch. Com'n.*, 518 F.2d 811 (7th Cir. 1975).

This argument mischaracterizes the plaintiff's cause of action. The plaintiff does not claim that the federal defendants simply failed to warn him of the criminal activities of a third party which led to his injury. Rather, the essence of the plaintiff's claim is that the federal defendants took affirmative actions which resulted in the deprivation of his property without due process of law. The plaintiff alleges that defendant Jones took steps to prevent the involved vehicles from being removed from Illinois commerce by actively interfering with the state police investigations in Peoria and Dixon. These allegations render *Redmond* inapposite to this case.

It is also asserted that the plaintiff's claim that the federal defendants should have foreseen that stolen vehicles would be purchased by innocent third parties does not support a constitutional claim. The defendant's reliance upon *Beard v. Mitchell*, 604 F.2d 485 (7th Cir. 1979) is misplaced. *Beard* involved a claim that an FBI agent's negligent supervision and training of an informant resulted in the unconstitutional deprivation of plaintiff's decedent's rights. The present case, however, involves more than mere negligent conduct on the part of these federal defendants. Here, the federal defendants acted wilfully. It is the intentional nature of the conduct challenged which distinguishes this case from *Beard*.

The Seventh Circuit's decision in *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1325 (1984), illustrates the significance of this distinction. In *Jackson*, the court held that a police officer's negligent failure to save the occupants of a burning vehicle did not give rise to a constitutional claim actionable under Section 1983. The court noted, however, that a different result would have been warranted if intentional conduct had been involved.

> It would be a different case if intentional misconduct were alleged; we may assume that if Officer Taylor, knowing the car was occupied and wanting the occupants to be burned to death, directed traffic away from the scene in order to prevent any passing driver

> from saving them, he would be liable under Section 1983 for having under color of the city ordinance making him a public officer deprived the plaintiff's decedents of their lives without due process of law.

Id. at 1202 (citations omitted).

In this case, defendant Jones allegedly directed the Illinois State Police to discontinue their investigation of certain stolen vehicles and to release those vehicles back into the stream of commerce. Without his interference, the state police presumably would have prevented the injury complained of by the plaintiff. Thus, the court concludes the defendants did have a duty not to intentionally deprive the plaintiff of his constitutional rights in the present case.

To establish a breach of that duty, the plaintiff must demonstrate the loss of a constitutionally protected right as a consequence of the defendants' conduct. *See Baker v. McCollan*, 443 U.S. 137 (1979). The court concludes that the plaintiff has adequately alleged that the federal defendants intentionally deprived him of his property or at least that their actions were taken in reckless disregard of plaintiff's constitutional rights. This is sufficient to establish a constitutional claim for the deprivation of property without due process. *Bonner v. Coughlin*, 545 F.2d 565 (7th Cir. 1976) (en banc), *cert. denied*, 435 U.S. 932 (1978). Thus, the sole remaining issue is whether the defendants are insulated from liability by their qualified immunity.

The instant case is not based upon a novel theory of constitutional entitlement. It can hardly be disputed that the plaintiff had a right not to be deprived of his property without due process. This fundamental constitutional right is not lost simply because an individual unwittingly and unfortunately becomes ensnared in the FBI's investigation of criminal activity. Moreover, these federal defendants cannot seek refuge in the claim that the exact factual predicate in question has not been the subject of a reported opinion. "Such asserted ignorance cannot provide a doctrinal safe harbor to the defendants here." *Little*

v. Walker, 552 F.2d 193, 197 (7th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978).

The FBI scheme clearly led to the plaintiff's being deprived of property. Hence, the defendant's qualified immunity rests upon whether they had the requisite good faith reasonable belief in the constitutionality of the scheme. The federal defendants emphasize that the plaintiff's allegations all relate to actions taken in furtherance of an authorized, "bona fide" FBI investigation. If the court were to accept this standard, federal defendants would be immunized from liability for *any actions* undertaken in the course of an authorized investigation. This clearly is not the law. Official authorization alone does not establish the objective legal reasonableness of the defendant's actions.

The court is unable to conclude as a matter of law that the federal defendant's qualified immunity immunizes them from liability. A genuine issue of fact exists as to whether these federal defendants should reasonably have known that their conduct would violate the plaintiff's constitutional rights. Therefore, defendants motion for summary judgment must be denied.

III. CONCLUSION

For the reasons set forth herein, defendants renewed motion to dismiss or for summary judgment is granted with respect to the common law torts alleged in Counts V and VI, and denied with respect to the remaining Counts.

ENTER:

/s/ STANLEY J. ROSZKOWSKI
Stanley J. Roszkowski, Judge
United States District Court

Dated: June 29, 1984

Supreme Court, U.S.
FILED
JAN 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-752

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN T. LIGHTNER, d/b/a LIGHTNER AUTO SALES, PETITIONER

v.

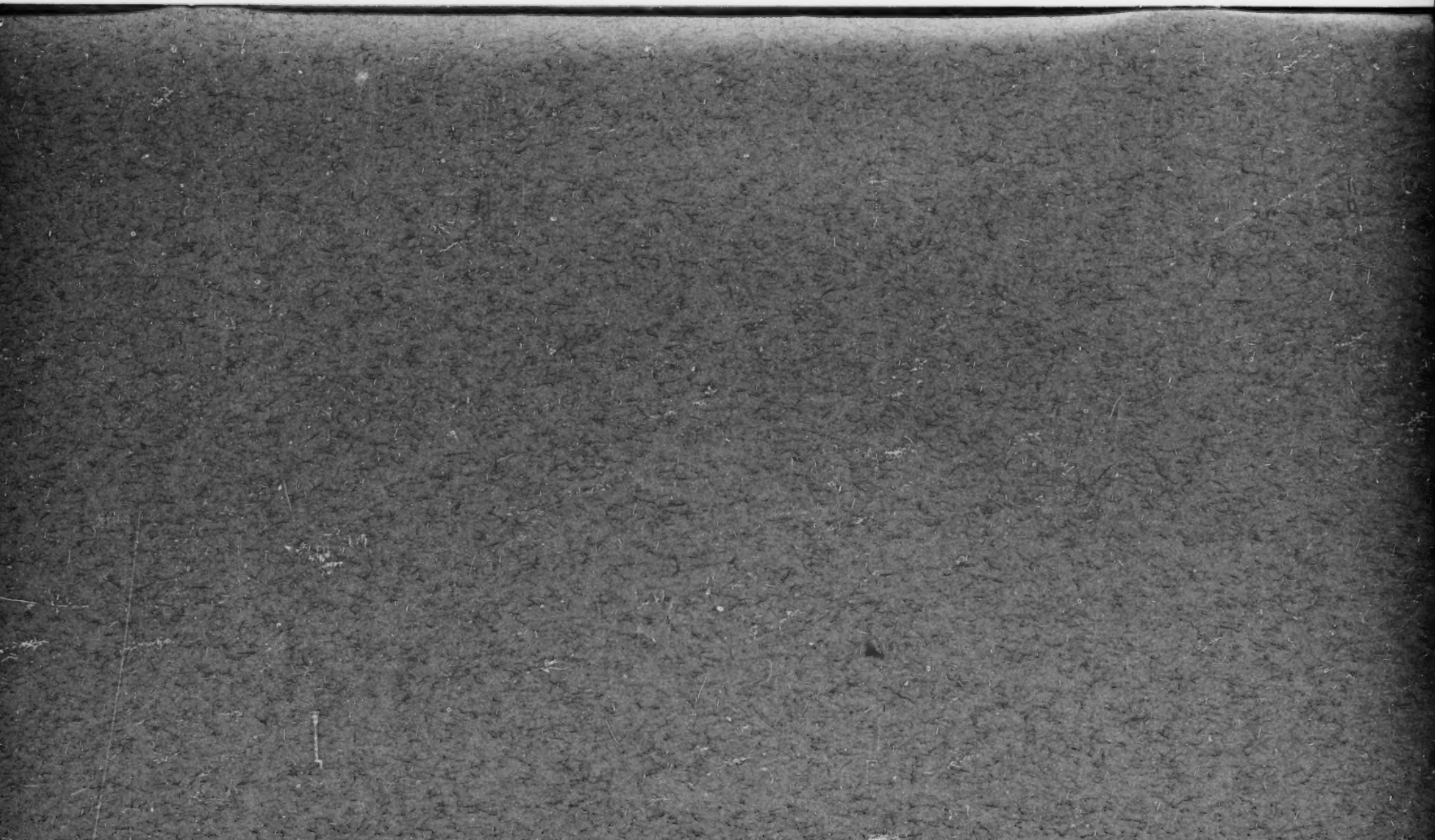
BARRY JONES AND BRUCE WHITE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
DOUGLAS LETTER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217



QUESTION PRESENTED

Whether petitioner's suit against respondent federal officials for alleged violations of due process and the Racketeer Influenced and Corrupt Organizations Act (RICO) is barred by qualified immunity when there is no case law suggesting that respondents' conduct in any way violated either RICO or the Due Process Clause.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Anderson v. *Creighton*, No. 85-1520 (June 25, 1987)	5, 6
Baucom v. *Martin*, 677 F.2d 1346 (11th Cir. 1982)	7
Beard v. *Mitchell*, 604 F.2d 485 (7th Cir. 1979)	6
Bergmann v. *United States*, 689 F.2d 789 (8th Cir. 1982)	6
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982)	5
Leonhard v. *United States*, 633 F.2d 599 (2d Cir. 1980), cert. denied, 451 U.S. 908 (1981)	6
Malley v. *Briggs*, 475 U.S. 335 (1986)	5
Mitchell v. *Forsyth*, 472 U.S. 511 (1985)	4, 6
Smith v. *United States*, 375 F.2d 243 (5th Cir.), cert. denied, 389 U.S. 841 (1967)	6-7
United States v. *Brown*, 635 F.2d 1207 (6th Cir. 1980)	7
United States v. *Rosner*, 485 F.2d 1213 (2d Cir. 1973), cert. denied, 417 U.S. 950 (1974)	7
Westfall v. *Erwin*, No. 86-714 (Jan. 13, 1988)	4

Constitution and statute:

U.S. Const. Amend. V (Due Process Clause)	3, 5
Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*	3

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-752

JOHN T. LIGHTNER, d/b/a LIGHTNER AUTO SALES, PETITIONER

v.

BARRY JONES AND BRUCE WHITE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 820 F.2d 818. The opinion of the district court (Pet. App. D2-D13) is reported at 564 F.Supp. 1112.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1-B2) was entered on May 8, 1987. A petition for rehearing with a suggestion of rehearing en banc was denied on August 3, 1987 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on November 2, 1987 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. From October 1980 through March 1982, the Federal Bureau of Investigation (FBI) conducted an undercover operation in the St. Louis area known as Operation Recoupe designed to shut down several large-scale stolen car rings. The FBI had previously been unable

to penetrate these crime rings which were responsible for 10,000 stolen vehicles per year in that area. C.A. App. 67.[1] Under Operation Recoupe, the FBI purchased auto wrecks and sold their titles and vehicle identification numbers (VINs) to targeted suspects, who used them to "retag" stolen cars, which then appeared to have legitimate titles. The FBI attempted to trace the flow of the VINs in order to determine the nature and extent of the stolen car distribution rings. Pet. App. 3; C.A. App. 68-69.

At the same time, the FBI was conducting a smaller investigation of a suspected stolen car and retagging operation run by Leroy Morton. A local used car dealer named David Lauck approached the FBI and agreed to provide information against Morton, who had asked him to distribute stolen, retagged cars.[2] C.A. App. 69, 72, 82-83. The FBI decided to accept Lauck's offer, but never told Lauck about Operation Recoupe (C.A. App. 81-84). Lauck distributed stolen cars for the Morton group, some of which coincidentally had VINs provided by the FBI pursuant to Operation Recoupe (C.A. App. 69-71). Lauck furnished the FBI with information regarding the retagging and distribution of the stolen cars (C.A. App. 72, 84).

In May 1981, Illinois police seized a stolen car from the lot of petitioner David Lightner, a used car dealer in the area (Pet. App. D3-D4). This car had previously been in the possession of Lauck, who had arranged for its sale on behalf of the Morton crime organization. The FBI feared that its seizure would focus suspicion on Lauck as a possible informant, and that he would be harmed or killed. C.A. App. 71, 95-98. Accordingly, respondent FBI Special Agent Barry Jones telephoned Illinois police and

---

[1] "C.A. App." refers to the appendix filed in the court of appeals.

[2] This person is wrongly identified in the district court opinion as David Locke (Pet. App. D3).

asked them to release the vehicle to petitioner and reassure him that it was not stolen (C.A. App. 108, 111-114).

A similar situation arose with respect to another stolen car that had been put up for sale by Lauck on behalf of the Morton organization. Again, the FBI feared that Illinois police interest in the vehicle would put Lauck in jeopardy and threaten the ongoing criminal investigation. C.A. App. 70-71, 95-98. Therefore, respondent Jones asked the Illinois police to release that vehicle too. Petitioner subsequently purchased the car. Pet. App. D4.

Petitioner eventually sold both cars, as well as other cars retagged with VINS provided by the FBI. When Operation Recoupe ended, the stolen cars were traced and seized by law enforcement officials and returned to their original owners or to insurance companies that had already paid claims on them. C.A. App. 54-55, 72, 84-85, 106-107, 114, 119. Operation Recoupe and the separate Morton investigation were highly successful, resulting in over 100 convictions (C.A. App. 72). FBI informant Lauck has relocated out of Missouri. His life has been threatened because of his activities assisting the FBI. C.A. App. 86.

2. The ultimate purchaser of one of the stolen cars sold by petitioner sued him in Illinois state court after the car was seized. Petitioner then filed a third-party action in that court against the other auto dealers who had sold him the stolen cars. He also named as third-party defendants certain Illinois police officers, as well as the United States Attorney General and respondents Special Agent Jones and former Assistant United States Attorney Bruce White. Petitioner sued the federal defendants in their individual capacities on a variety of counts, including a deprivation of property in violation of the Fifth Amendment, a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) provisions of 18 U.S.C. 1961 *et seq.*, and two common law state tort claims. The federal defendants removed the case to federal court, and that court granted a

motion to dismiss for lack of in personam jurisdiction the claims against the Attorney General. See 564 F. Supp. 1112 (N.D. Ill. 1983).

In June 1984, the district court granted a partial dismissal of the action against respondents (Pet. App. D2-D13). The court dismissed the two common law state tort claims on the basis of absolute immunity, but declined to dismiss the RICO and constitutional claims (Pet. App. D6).[3] It specifically rejected the claim of qualified immunity as to the constitutional claims, concluding that petitioner's allegations were sufficient to state a constitutional claim for intentional deprivation of property without due process, and that a "genuine issue of fact exists as to whether these federal defendants should reasonably have known that their conduct would violate [petitioner's] constitutional rights" (Pet. App. D13).[4]

3. Respondents immediately appealed the denial of qualified immunity. The Seventh Circuit dismissed the appeal, finding the interlocutory judgment non-appealable. 752 F.2d 1251 (1985). Following this Court's ruling in *Mitchell* v. *Forsyth,* 472 U.S. 511 (1985), however, the appeal was reinstated, and the Seventh Circuit reversed the decision below, holding that respondents are protected by qualified immunity (Pet. App. A2-A10). The majority

---

[3] Petitioner did not contest the dismissal of the state tort claims in district court (Pet. App. D6) or raise the issue on appeal. Nor does he challenge the dismissal of those counts in his petition. Accordingly, the Court's recent decision in *Westfall* v. *Erwin,* No. 86-714 (Jan. 13, 1988), has no bearing on this case.

The court rejected respondents' argument that the RICO claim was, like the state law claims, barred by absolute immunity, and also rejected the assertion of respondent White that his conduct was protected by absolute prosecutorial immunity (Pet. App. D6-D9).

[4] The district court did not discuss the applicability of qualified immunity to the RICO claim.

ruling was based on separate opinions filed by Judges Pell and Flaum (Pet. App. A2).

Judges Pell and Flaum both noted that qualified immunity is governed by an objective test, looking to whether government officials have violated a clearly established constitutional right. See *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). They further observed that "clearly established" does not mean simply that the right has been stated in general terms, but rather requires indication in the existing case law that the actual conduct in question violates the plaintiff's rights (Pet. App. A4-A5, A7, A9-A10). Both judges concluded that this standard was not met here because there were no reported cases finding a Fifth Amendment due process violation in analogous circumstances (Pet. App. A5-A7, A10). While both indicated that qualified immunity could still be denied if the government officials' conduct was egregious, neither found that respondents' conduct fit that description (Pet. App. A7-A8, A10).[5]

ARGUMENT

The decision below does not conflict with any decision of this Court or any other court of appeals; nor does petitioner even claim such a conflict. In fact, the decision below follows directly from this Court's recent decision in *Anderson* v. *Creighton*, No. 85-1520 (June 25, 1987). Accordingly, no further review is warranted.

1. In *Anderson*, the Court reaffirmed (slip op. 2-3) the holding in *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982), that government officials are immune from suit involving their official actions unless it was "clearly established" at the time that their acts would violate the plaintiff's rights. Accord *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986);

[5] Judge Wisdom dissented because he believed that the United States government should pay for the costs of Operation Recoupe (Pet. App. A13).

Mitchell v. *Forsyth*, 472 U.S. 511, 528 (1985). As the Court explained in *Anderson* (slip op. 3-4), this means not merely that a general right alleged to have been violated is clearly established, but further that a reasonable official would know that his own particular conduct is in violation of that established right (*id.* at 4). The Court stressed (*id.* at 4-5): "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, * * * but it is to say that in light of preexisting law the unlawfulness must be apparent."

The test stated by the Court in *Anderson* is precisely the test applied here by the court of appeals. See Pet. App. A4-A5, A7, A9-A10. Conversely, in denying qualified immunity, the district court made the precise error condemned in *Anderson* of focusing on the fact that the right to due process is itself well established without looking to see whether preexisting law made it apparent that respondents' conduct was unlawful. See Pet. App. D12 ("It can hardly be disputed that the plaintiff had a right not to be deprived of his property without due process."). Petitioner has wholly failed to point to *any* case law that would inform a reasonable official that respondents violated petitioner's rights when, in order to protect Lauck's life and the ongoing investigation, respondent Jones asked the Illinois police to release the vehicles in question. He has not only failed to establish a violation of a clearly established right—he has failed to show that his rights have been violated at all. See Pet. App. A5-A6.[6]

---

[6] The federal courts have in a variety of circumstances deferred to the judgments of law enforcement officials regarding how best to protect informants and to determine when to end an ongoing investigation (see, *e.g.*, *Bergmann* v. *United States*, 689 F.2d 789, 794-795 (8th Cir. 1982); *Beard* v. *Mitchell*, 604 F.2d 485, 495-496 (7th Cir. 1979); *Leonhard* v. *United States*, 633 F.2d 599 (2d Cir. 1980), cert. denied, 451 U.S. 908 (1981); *Smith* v. *United States*, 375 F.2d 243, 248 (5th

2. Petitioner's second claim—that his RICO count should not have been dismissed—is wholly without merit. As the court of appeals noted (Pet. App. A2), petitioner failed to allege facts sufficient to make out the essential element of criminal intent. Indeed, it is perfectly clear that respondents' conduct did not violate the statute because the requisite criminal intent was lacking. See *Baucom* v. *Martin*, 677 F.2d 1346, 1350-1351 (11th Cir. 1982); *United States* v. *Rosner*, 485 F.2d 1213, 1223 (2d Cir. 1973), cert. denied, 417 U.S. 950 (1974). Respondents were accordingly entitled to dismissal of this count, either on the merits or under the defense of qualified immunity.[7]

Cir.), cert. denied, 389 U.S. 841 (1967)), and have declined to criticize police conduct analogous to that taken here (*e.g.*, *United States* v. *Brown*, 635 F.2d 1207, 1212-1214 (6th Cir. 1980)).

[7] Judge Wisdom concluded (Pet. App. 13) that the costs of Operation Recoupe should be borne by the United States government. The question before the court of appeals, however, was whether respondents Special Agent Jones and AUSA White could be held individually liable for petitioner's losses. Whether the United States should be liable to petitioner is a totally different question, which was not before the court of appeals and is not now before this Court. We are informed by the United States Attorney handling the case that petitioner has amended his third-party complaint in the district court to add the United States as a third-party defendant. The liability of the United States, if any, is therefore yet to be determined.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
DOUGLAS LETTER
Attorney

JANUARY 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60242